



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 26, 1995

Mr. Richard A. Peebles
Attorney at Law
4001 Garth Road, Suite 107
Baytown, Texas 77521-3115

OR95-701

Dear Mr. Peebles:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32149.

The Lee College District (the "district") received a request for an incident report concerning a sexual harassment complaint. You contend that the requested information is excepted from required public disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure under the common-law right of privacy as section 552.101 incorporates it, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that

information ... is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former V.T.C.S. art. 6252-17a, § 3(a)(1)). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files in *Ellen* contained individual witness and victim statements,

an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d 519. The court ordered the release of the affidavit of the person under investigation, and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* at 525. The court held, however, that the names of witnesses and detailed affidavits regarding allegations of sexual harassment was exactly the kind of information specifically excluded from disclosure under the privacy exception as described in *Industrial Foundation*. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released."¹ *Id.*

We believe the decision in *Ellen* applies to the requested record at issue. The district must, therefore, withhold the identity of the complainant. We have marked the information that must be withheld under common-law privacy. The remaining information, however, is not excepted under section 552.101 of the Government Code.

Section 552.108 provides that:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure].

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure].

Where an incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information which relates to the incident. Open Records Decision Nos. 474 (1987), 372 (1983).² Certain factual information generally found on the front page of police offense reports, however, is public even during an active investigation. *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976) at 3-4 (listing factual information available to public).

¹Although the *Ellen* court recognized that the person accused of misconduct may in some instances have a privacy interest in information contained within investigatory files, we think in this case the public's interest in disclosure of this somewhat embarrassing information greatly outweighs the accused's privacy interest. See *Ellen*, 840 S.W.2d at 525.

²This office has ruled that there is no reason to distinguish offense and arrest records of a university campus police department from those of police departments in general. Open Records Decision No. 612 (1992) at 3.

Although you claim that the investigation "remains open at this time," the information you have submitted for our review constitutes front page offense information. This information is public and may not be withheld under section 552.108.

Section 552.103(a) excepts information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To be excepted under section 552.103(a), information must relate to litigation that is pending or reasonably anticipated. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

You claim that the district may be a party to litigation because the statute of limitations has not expired for filing a civil or criminal proceeding and because the incident report was prepared by a security officer employed by the district.³ Section 552.103(a) requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Attorney General Opinion JM-266 (1984); Open Records Decision Nos. 518 (1989), 328 (1982). Furthermore, the mere contemplation of future litigation by a governmental body is not sufficient to invoke section 552.103(a). Open Records Decision No. 557 (1990). The district has not met its burden under section 552.103(a) to demonstrate that either civil or criminal litigation is pending or reasonably anticipated. You may not withhold the requested records under section 552.103.

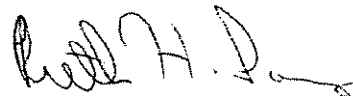
Section 552.111 excepts "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Section 552.111 excepts from public disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. Open Records Decision No. 615 (1993) at 5. The policymaking functions of an agency, however, do not encompass routine internal administrative and personnel matters. *Id.* Furthermore, section 552.111 does not except purely factual information from disclosure. *Id.*

³You have not explained, nor is it apparent to this office from the incident report, what type of criminal charges might be filed.

The requested document does not constitute an internal communication consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the district. You may not withhold the information under section 552.111. Accordingly, except for the identifying information marked under common-law privacy, the district must release the requested information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/LBC/rho

Ref: ID# 32149

Enclosures: Marked documents

cc: Mr. Bobby Horn Jr.
Editor
The Lantern
Lee College
P. O. Box 818
Baytown, Texas 77522-0818
(w/o enclosures)